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Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime

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Consideration of the revised draft United Nations Convention against Transnational Organized Crime, with particular emphasis on articles 2, 2 *bis* (subparagraph (a) only), 4, 4 *bis*, 4 *ter*, 4 *quater*, 7, 7 *bis*, 7 *ter*, 17, 17 *bis*, 18, 18 *bis* and 18 *ter*

Proposals and contributions received from Governments

Addendum

Contents

		Page
II.	Proposals and contributions received from Governments	2
	Belarus	2
	China	3
	France	4
	Libyan Arab Jamahiriya	4
	Lithuania	5
	Netherlands	5
	Russian Federation	7
	Syrian Arab Republic	8
	Tajikstan	14

* A/AC.254/26.

II. Proposals and contributions received from Governments

Belarus

[Original: Russian]

Article 10: Extradition

1. In the light of the requirements of judicial procedure, Belarus suggests that it would be advisable in this article to specify the purposes of extradition, namely, that extradition is undertaken for the purpose of criminal prosecution or enforcement of a judicial sentence.

2. Notwithstanding the fact that the general conditions governing extradition are referred to in paragraph 5, some specific conditions are mentioned in paragraphs 6 and 10 (nationality, prosecution on account of gender, race, etc.). Belarus feels that it would be logical either to enumerate all the possible grounds for refusing an extradition request or else to delete from the text of the draft Convention the aforementioned grounds for refusal.

Paragraph 7 bis

3. It is proposed that paragraph 7 *bis* be deleted from the text for the following reasons:

(a) It is unlikely that the national law of States Parties will provide for simplified procedures for extradition alongside the general procedures;

(b) The application of simplified procedures for extradition solely in the case of offences covered by this Convention is illogical.

Attention should also be drawn to the unacceptability of using the words "any person" in this paragraph since this expression would also encompass the nationals of the requested State Party, whose extradition is not permitted under the law of most States.

4. In practice, extradition normally relates to the transit conveyance of the extraditable persons. In that regard, Belarus would propose supplementing article 10 with provisions stipulating the obligations of States Parties to authorize the transit conveyance of such persons across their territory.

Article 14: Mutual legal assistance

Paragraph 7

5. Belarus considers it necessary in paragraph 7 to specify cases in which the extradition of persons held in custody for the purposes of giving evidence may not take place (if, for example, during the period that such person is held in the requested State the time limit of the custody of that person elapses).

Paragraph 20 bis

6. Belarus thinks that there may be an error in paragraph 20 *bis*. The words "requested" and "requesting" should be reversed. Also, the words "with the consent of the latter" should be added at the end of the paragraph.

Article 14 bis: Joint investigations

7. Given that the function of investigation comes within the competence not only of the police and judicial authorities, Belarus proposes that the words "or other competent" be inserted after the word "police".

Article 18 ter: Measures to enhance cooperation with law enforcement authorities

Paragraph 2 bis

8. In paragraph 2 *bis* reference should be made to the fact that immunity from prosecution shall only be granted if the person did not participate in the offence committed.

China*

[Original: English]

Article 14: Mutual legal assistance

Paragraph 6

1. Replace the paragraph with the following:

> "6. The requested State Party shall be obliged to provide assistance only if the conduct in relation to which the request was made would constitute an offence under its domestic law. However, it may, when it deems appropriate, provide assistance, in so far as it decides to do so at its own discretion, irrespective of whether the conduct would constitute an offence under the laws of both the requesting State Party and the requested State Party."

Paragraph 7

2. Subject to its domestic laws and practice, each State Party shall, upon request:

(a) When a witness, expert or other person who is present in its territory consents, facilitate his or her presence in the territory of the requesting State Party to give evidence in a proceeding or to assist in an investigation;

(b) When a person who is in custody in its territory consents, reach an agreement with the requesting State Party for the purpose of facilitating his or her presence in the territory of that Party to give evidence in a proceeding or to assist in an investigation, provided that he or she is kept continuously in custody and is returned unconditionally as soon as possible after having given evidence or assisted in the investigation.

(...) A witness, expert or other person who is present in the territory of the requesting State Party in accordance with paragraph 7 (a) of this article shall not be prosecuted, detained, punished or subject to any other restriction of his or her personal liberty in that territory in respect of any acts, omissions or convictions prior to his or her departure from the territory of the requested State Party. Such safe conduct shall cease when the person having had, for a period of fifteen consecutive days or for any period agreed upon by the Parties, from the date on which he or she has been officially informed

* Amendments previously issued in documents A/AC.254/L.38 and A/AC.254/L.50.

that his or her presence is no longer required, an opportunity of leaving, has remained voluntarily in the territory or has returned voluntarily after having left.

Paragraph 8

3. Add the following sentence after the first sentence: "A State Party may also designate separate authorities for the same purpose for its special regions or territories that have separate systems of mutual legal assistance."

France

[Original: French]

Article 2: Scope of application

Paragraph 1

France proposes that paragraph 1 be reworded as follows:

"1. The Convention shall, except as otherwise provided herein, apply to the prevention and suppression of:

"(a) Serious crime, as defined in article 2 *bis* of this Convention;

"(b) The offences established in articles 4, 4 *ter* and 17 *bis* of this Convention; where involving an organized criminal group; and

"(c) The offence established in article 3 of this Convention."

Libyan Arab Jamahiriya*

[Original: Arabic]

Article 14: Mutual legal assistance

Paragraph 2

Replace paragraph 2 with the following:

"2. Legal assistance may be requested for the following purposes:

"(a) Obtaining evidence or information;

"(b) Effecting service of judicial documents;

"(c) Executing searches and seizures;

"(d) Examining objects and sites;

"(e) Providing originals of relevant documents and records or certified copies thereof;

"(f) Identifying or tracing proceeds, property, instrumentalities or other things for evidentiary purposes;

"(g) Facilitating the appearance of persons in the requesting State Party;

* Amendments previously issued in document A/AC.254/L.49.

"(h) Any other type of assistance.

"(...) In order to put the provisions of paragraph 2 of this article into effect, it is necessary:

"(a) That this is allowed by the domestic law of the requested State Party;

"(b) That the action taken in response to the request for legal assistance is executed by the requested State Party as it deems appropriate."

Lithuania

[Original: English]

Article 9

Paragraph 2

Paragraph 2 of article 9 of the draft Convention recommends that but does not make it an obligation for State Parties to establish jurisdiction over offences committed by their nationals in a foreign State (when the alleged offender is a national or a habitual resident of that State, the offence was committed against that State or a national of that State or the offence has substantial effects in that State). Lithuania believes that prosecution for offences committed by nationals in foreign States is an obligation of the State concerned vis-à-vis other States in whose territories those offences were committed, just as prosecution of offences committed against the State itself, against its nationals or offences with effects in that State is an obligation of that State vis-à-vis its citizens. Therefore, the recommended principles of establishment of jurisdiction are not of an identical nature. Taking this into account, Lithuania ventures to suggest setting in the Convention the obligation for a State to establish jurisdiction over the offences when the alleged offender is a national of that State and only recommending establishment of jurisdiction in cases when the offence was committed against that State or a national of that State and the offence has substantial effects in that State.

Netherlands

[Original: English]

Structure of the Convention

1. The Secretariat should be given a mandate to propose to the Ad Hoc Committee at its ninth session a proper structure of the Convention.

2. The practical application of the Convention can undoubtedly be enhanced by structuring the Convention in such a way that the reader can easily find the subject he or she is looking for. This could be done by dividing the Convention into chapters (i.e. "Criminalization and jurisdiction", "Cooperation", etc.), breaking down particularly long chapters, such as "Cooperation", into subchapters and finally subdividing long articles, such as articles 10 and 14, into further articles with clear titles.

Article 10: Extradition

3. As a follow-up to footnote 107 in document A/AC.254/4/Rev.6, paragraph 1 *bis* and 1 *ter* should read:

> "1 *bis*. Where extradition is requested for serious offences [as referred to in article 2], the requested State Party shall, for the purpose of determining the involvement of an organized criminal group, take into consideration the information contained in the warrant of arrest or order having the same effect or in the conviction of the person whose extradition is requested or in any additional statement of the facts provided by the requested State Party.
>
> "1 *ter*. If the request for extradition includes several separate serious offences, but of which some are other than those covered by this Convention, the requested Party shall have the right to apply this article also in respect of the latter offences."

4. As regards the revision to paragraph 1 *bis*, since article 2 will provide that serious offences involving an organized criminal group fall within the scope of the Convention, this paragraph is intended to indicate to State Parties how the requesting State Party can provide information on the involvement of an organized criminal group and at the same time gives guidance to the requested State Party on how it can determine the involvement of an organized criminal group.

5. Paragraph 1 *ter* does not establish an obligation. It provides an option for State Parties in cases where extradition is requested, not only for offences covered by this Convention, but also for other serious offences, where for example the involvement of an organized criminal group can not be determined, to grant extradition also for those offences falling outside the scope of the Convention. Without this paragraph the requested State Party would be obliged to refuse extradition for the latter offences for the sole reason that they fall outside the scope of the Convention.

6. The Netherlands proposes to add a new paragraph at the end of the article:

> "(...) Nothing in this article shall prevent State Parties to apply this article to other serious offences than those covered by this Convention."

This provision does not establish an obligation. It is intended to provide State Parties with the option to apply the provisions on extradition in cases of serious offences all of which fall outside the scope of the Convention (no involvement of an organized criminal group can be determined). This provision goes thus beyond the provision of paragraph 1 *ter* and is intended especially in cases where the extradition is sought at an early stage of the investigation.

Paragraph 3

7. The sentences in brackets should be replaced with: "Each State Party shall at the moment of the ratification of the Convention declare whether it makes extradition conditional on the existence of a treaty and, if so, how it will apply this paragraph." Experience with the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 shows that the addition of this sentence is of great importance for the practical application of the Convention. The declaration is intended to prevent States from preparing and sending extradition requests to other States only to find out that the requested State does not apply this paragraph.

Article 14: Mutual legal assistance

Paragraphs 1 and 1 bis

8. The present paragraphs 1 and 1 *bis* should be replaced with the following text:

> "1. States Parties shall afford one another, pursuant to this article, the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to offences covered by this Convention.
>
> "1 *bis*. Where the request relates to serious offences [as referred to in article 2], the requested State Party shall for the purpose of determining the involvement of an organized criminal group, take into consideration the information contained in the request or in any additional statement provided by the requested State Party."

Paragraph 1 ter

9. The present paragraph 1 *ter* should be replaced with:

> "1 *ter*. Mutual assistance shall also be afforded in connection with investigations, prosecutions and judicial proceedings as referred to in paragraph 1 of this article for which legal persons may be held criminally liable in the requesting State Party. Assistance shall not be refused on the sole ground that the domestic law of the requested State Party does not provide for criminal liability of legal persons."

Although article 5 provides States Parties with an option to establish criminal, civil or administrative liability of legal persons, this should not have as a consequence that States Parties who have established a criminal liability of legal persons could not get mutual assistance from a State Party that has instead chosen to establish civil or administrative liability of legal persons.

10. The Netherlands proposes to add a new paragraph at the end of the article:

> "(...) Nothing in this article shall prevent States Parties to apply this article to other serious offences than those covered by this Convention."

This provision does not establish an obligation. It is intended to provide States Parties with the option to apply the provisions on mutual assistance in cases were assistance is requested for serious offences all of which fall outside the scope of the Convention (no involvement of an organized criminal group can be determined). This provision is intended especially in cases where the assistance is sought at an early stage of the investigation.

Russian Federation*

[Original: Russian]

Article 7 ter

1. In the interests of effective implementation of the provisions of the draft United Nations Convention against Transnational Organized Crime concerning cooperation in matters relating to the freezing, seizure and confiscation of property, the Russian delegation considers it essential that the domestic legislation of States Parties

* Amendments previously issued in document A/AC.254/L.144.

allow courts or other competent authorities of the requested State to review the question and to take a decision on the return in full or in part to the requesting State of property, proceeds of crime, instrumentalities used in its commission or other things in relation to which a request has been received.

2. The Russian delegation accordingly proposes that the following wording be added as paragraph 1 *ter* of article 7 *ter*:

> "Each State Party shall adopt such legislative and other measures as may be necessary to permit its courts and other competent authorities to review questions concerning the transfer, in full or in part, to a requesting State of property, proceeds of crime, instrumentalities used in its commission or other things in relation to which an appropriate request for their transfer has been received."

Syrian Arab Republic

[Original: Arabic]

A. Amendment previously issued in documents A/AC.254/L.34 and A/AC.254/L.131

Article 9: Jurisdiction

Paragraph 1

1. The phrase beginning with "when the offence is committed" up to the end of the paragraph should be replaced with the following: "when the offence is committed in its territory or on board a vessel or an aircraft registered in it [the State] at the time the offence is committed." The phrase "at the time the offence is committed" corresponds to article 4, paragraph 1 (a) (ii), of the 1988 Convention.

Paragraph 2

Subparagraph (c)

2. Subparagraph (c) should be deleted as it can be replaced by subparagraph (b).

Subparagraph [(d)]

3. Subparagraph [(d)] should be deleted.

Paragraph 2 bis

4. This paragraph should be deleted as it is duplicated by paragraph 3.

Paragraph 4

5. This paragraph should be deleted.

Paragraph 5

6. The words "shall coordinate" should replace the words "shall seek to coordinate".

Paragraph 6

7. The words "Without prejudice to the provisions of article 2, paragraph 4, of this Convention" should be added at the beginning of this paragraph.

Article 10: Extradition

Paragraph 1

8. The text of paragraph 1 should remain as is and not follow the suggestion contained in footnote 81, since the minimum and maximum sentences to deprivation of liberty for "serious crime" will be established in article 2 *bis*, subparagraph (b), and article 6, paragraph 5, provides for taking into account the gravity of offences when establishing sanctions.

Paragraph 2

9. There is no need for footnote 82 relating to paragraph 2, since double criminality goes without saying.

Paragraph 3

10. Although the words "it may" appear in paragraph 3 of article 6 of the 1988 Convention, it would be advisable to use the words "it shall" as long as paragraph 2 provides for consideration of the offences to which article 10 shall be applied as included in the applicable treaties on extradition.

Paragraph 6

11. [Not applicable to the English text.]

Paragraph 7

12. The text of this paragraph should remain as is, including the bracketed text.

Paragraph 9

Subparagraph (a)

13. There is no need for the phrase "for the purpose of prosecution", which is placed between brackets, since the person could be an offender or an alleged offender, whereas the phrase "for the purpose of prosecution" refers only to the alleged offender.

14. The phrase "subject to the condition of double criminality" should be retained, whereas the last sentence of subparagraph (a) and all of subparagraph (b) should be deleted.

Paragraph 14

15. This paragraph should remain in article 10.

Article 14: Mutual legal assistance

Paragraph 13

16. The words "a criminal offence" at the end of the paragraph should be replaced with the words "a punishable offence", since perjury constitutes a misdemeanour in certain instances and a felony in others.

Paragraph 16

Subparagraph (c)

17. The meaning of the words "similar offence" requires clarification.

B. Further amendments

Article 10: Extradition

Paragraph 6

18. The reference of the term "gender" to both men and women should be explained.

19. The Syrian Arab Republic supports the proposal of China with regard to the addition of the following sentence at the end of paragraph 6: "Before refusing extradition pursuant to this paragraph, the requested State Party shall consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegations."

20. The Syrian Arab Republic supports the proposal of Italy that a provision addressing the issue of persons sentenced *in absentia* be added after paragraph 6 that might read as follows:

> "1. The fact that a judgement has been issued *in absentia* shall not be a ground for refusal of extradition if it appears that the case has been tried with the same guarantees as when a defendant is present and if one of the following has occurred:
>
> "(a) The defendant, having knowledge of the trial, has deliberately avoided being arrested; or
>
> "(b) The defendant, having been regularly summoned, has deliberately failed to appear at the trial.
>
> "2. When such conditions are not met, extradition shall in any case be granted if the requesting State gives assurance, deemed satisfactory by the requested State, that the person whose extradition is sought shall be entitled to a new trial protecting his or her rights of defence."

Paragraph 9

Subparagraph (a)

21. The word in brackets "[Convention]" should be deleted.

22. The brackets should be removed.

Subparagraph (a bis)

23. This paragraph should be deleted.

Subparagraph (a ter)

24. Option 1 should be adopted.

Proposed additional paragraph

25. The Syrian Arab Republic supports the proposal of India (contained in document A/AC.254/L.43) that, following paragraph 10, a new paragraph should be inserted to deal with requests for the extradition of the same person or persons, to read as follows:

> "(...) If the extradition of the same person or persons, whether for the same offence or for different offences under this Convention, is requested by more than one State Party, the requested State Party shall determine to which State the person or persons shall be extradited first. In determining this, the requested State shall give due consideration to the following factors:
>
> "(a) The severity of the offences for which extradition has been sought by the requesting States Parties;
>
> "(b) The nationality of the person or persons whose extradition has been sought;
>
> "(c) The dates of receipt of the requests for extradition;
>
> "(d) Any other factor that the requested State may consider expedient."

Comments on the additional paragraphs proposed by Poland (A/AC.254/5/Add.7)

26. There is no need to add the proposed new paragraph 15 since other States have established their jurisdiction in accordance with paragraphs 1 and 2 of article 9.

27. It should be noted that paragraph 17 of article 14 contained a provision similar to that of paragraph 16.

28. It is preferable that the provision of paragraph 17 be limited to refusal of extradition if the facts on which the request is grounded do not constitute an offence under the law of the requested State.

Article 14: Mutual legal assistance

Paragraph 1

29. The brackets should be removed.

Paragraph 1 bis

30. This paragraph should be deleted.

Paragraph 1 ter

31. The Syrian Arab Republic supports the following reformulation of this paragraph, as indicated in the footnote:

"Mutual legal assistance shall be afforded with respect to investigations, prosecutions and judicial proceedings relating to offences for which a legal person may be held liable in the requesting State Party."

Paragraph 1 ter

32. The brackets should be removed.

Paragraph 2

Subparagraph (b)

33. The brackets should be removed.

Subparagraph (c bis)

34. The brackets should be removed.

Subparagraph (e)

35. The brackets should be removed.

Subparagraph (h bis)

36. The brackets should be removed.

Subparagraph (i)

37. The words in brackets "[or requesting]" should be deleted.

Paragraph 6

38. The Syrian Arab Republic supports the alternative formulation proposed by China, as contained in the footnote.

Paragraph 7

39. The brackets should be removed.

40. The words "shall adopt" should be replaced with the words "shall seek to adopt".

Subparagraph (b)

41. The words "[as soon as circumstances permit]" should be replaced with the words "as soon as the person has finished giving evidence or assisting in the investigations".

Subparagraph (c)

42. The words "or other" should be inserted between the word "extradition" and the word "proceedings".

Paragraph 8

43. The words in brackets "[, controlling quality and setting priorities]" should be deleted.

Paragraph 16

Subparagraph (c)

44. The meaning of the words "similar offence" should be clarified.

Subparagraph (g)

45. This subparagraph should be deleted following the proposal to delete paragraph 1 *bis* of article 14.

Paragraph 18

46. The brackets should be removed.

Paragraph 20

47. [Not applicable to the English text.]

Article 15: Special investigative techniques

Paragraph 1

48. The brackets should be removed.

49. The word "transnational" should be inserted between the word "combating" and the words "organized crime".

Paragraph 2

50. The brackets should be removed from the phrase "[covered by this Convention]".

Paragraph 3

51. This paragraph should be amended to read:

> "3. In decisions to use such special investigative techniques at the international level, consideration shall be given to financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned."

Paragraph 4

52. The brackets should be removed.

Article 16: Transfer of proceedings

53. The words "an offence covered by" should be retained.

Tajikistan*

[Original: English]

Article 14: Mutual legal assistance

Paragraph 13

In paragraph 13, the word in square brackets could be deleted on the ground that it could be considered to indicate a lack of confidence in the law enforcement agency to which a request is addressed for whose execution an additional authority with supervisory functions is required.

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* Amendments previously issued in document A/AC.254/L.130.